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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

1. Is a prehire agreement authorized by Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), enforceable in a suit brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, absent a showing that the union signatory to the agreement is the majority representative of the employer's employees?
2. Is a prehire agreement authorized by Section 8(f) of the National Labor Relations Act enforceable if it was entered into by an employer because of coercion by a union?

List of Parties to Proceeding Below.

Pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States, a list of the parties in the proceeding below is submitted:

Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Jerald B. Laird, William Cobb, Jr., C.W. Poss, Verne W. Dahnke, Alexander Rados, William A. Floyd and Jerry Toll, each in his respective capacity as Trustee of the Operating Engineers Health & Welfare Fund; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, John C. Maxwell, William C. Waggoner, Dale I. Vawter, C.V. Holder, William A. Cobb, Jr., Alexander Rados, William A. Floyd, Edwin Kalish, Steve Billy, Winton Kemmis and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Pension Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, Jerry Toll, William C. Waggoner, C.I.T. Johnson, Dale I. Vawter, Don McCoy, William A. Cobb, Jr., Alexander Rados,

William A. Floyd and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, Robert Lytle, Dale I. Vawter, Kenneth J. Bourguignon, Verne W. Dahnke, Winton Kemmis, William A. Floyd and Don MacIntosh, each in his respective capacity as Trustee of the Operating Engineers Training Trust,

Appellees below,

Jim McNeff, Inc.,

Appellant below.

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No. ..-....

IN THE

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October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Jim McNeff, Inc., a California corporation, respectfully prays that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit which was entered in this proceeding on February 8, 1982.[1]

OPINIONS AND ORDERS BELOW.

The Judgment and Opinion of the U.S. Court of Appeals for the Ninth Circuit, which was entered in this matter on February 8, 1982, is styled, *Frank L. Todd, et al. v. Jim*

[1]The within matter was numbered Case No. 80-5214 in the Court of Appeals. It is reported at 667 F.2d 800. Jim McNeff, Inc. was the Defendant-Appellant below, and Frank L. Todd, *et al.* were the Plaintiff-Appellees below.

McNeff, Inc., a California corporation, and is reported at 667 F.2d 800. It appears as Appendix A.

The U.S. District Court for the Central District of California entered its Order on February 11, 1980, which is not officially reported. The Order appears as Appendix B.

The Findings of Fact and Conclusions of Law of the U.S. District Court for the Central District of California were made on the record in oral argument on February 4, 1980. The transcript appears as Appendix C.

On July 10, 1979, the Regional Director of Region 21 of the National Labor Relations Board issued a dismissal letter refusing to issue complaint against Jim McNeff, Inc. based on a charge filed by the International Union of Operating Engineers, Local No. 12. The document appears as Appendix D.

On November 8, 1979, the General Counsel of the Board, by letter, denied the appeal of the action of the Regional Director. The document appears as Appendix E.

On November 17, 1980, the Board issued a Supplemental Decision and Certification of Results of Election which is not officially reported. The Decision appears as Appendix F.

JURISDICTION OF THE SUPREME COURT.

The judgment and opinion of the U.S. Court of Appeals for the Ninth Circuit was entered on February 8, 1982. No petition for rehearing, or for further hearing before the full Court, has been filed.

The jurisdiction of the U.S. Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED.

United States Code, Title 29:

§ 185(a) "Suits for violation of contracts between an employer and a labor organization representing

employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

§ 158(a)(5) "It shall be an unfair labor practice for an employer —

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

§ 158(f) "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such

employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

Statement of the Case.

Statement of Facts.

Jim McNeff, Inc. ("McNeff, Inc.") is an employer engaged in business in the construction industry. In September of 1978, McNeff, Inc. was engaged in business as a subcontractor on a jobsite in Southern California. McNeff, Inc. employed three employees on the jobsite, none of whom were members of the International Union of Operating Engineers, Local No. 12 ("Union"). McNeff, Inc. was not signatory to any agreement with the Union.

On September 13, 1978, a representative of the Union approached Jim McNeff, President of McNeff, Inc., and informed him that McNeff, Inc. would have to sign the Master Labor Agreement ("Agreement") with the Union or leave the job. McNeff refused the ultimatum.

The Union representative left and returned with the general contractor who also informed McNeff that he would have to sign the Agreement if he wanted to continue on the site. McNeff then relented and signed the Agreement. He did not read the Agreement or intend to abide by its terms. McNeff then had all three nonunion employees sign union cards the same day.

McNeff, Inc. never complied with the Agreement. From October, 1978 to March, 1979, the union trust funds sent reports to McNeff, Inc. for their completion and return. McNeff, Inc. returned the forms each month and wrote upon

them that "no members of this craft were employed during this month."

One month after the first form was returned to the trust fund, the trustees requested an audit of McNeff, Inc.'s books. An audit was eventually conducted and the trustees claimed $5,316.79 to be due the trusts.

Proceedings Below.

On April 26, 1979, trustees filed a breach of contract suit against McNeff, Inc. pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, in the Federal District Court for the Central District of California.

On May 22, 1979, McNeff, Inc. filed a petition with the National Labor Relations Board ("Board") seeking a representation election among all of its employees performing operating engineer work as delineated in the Agreement.

On June 4, 1979, the Union filed a charge with the Board against McNeff, Inc. alleging that McNeff, Inc. had violated Section 8(a)(5) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(5), by repudiating and failing to comply with the Agreement.

On July 10, 1979, the Regional Director of Region 21 of the Board, by letter, dismissed the Union's charge and refused to enforce the Agreement, noting that a full collective bargaining relationship had not been established. The Director refused to hold that the Union had perfected a full collective bargaining relationship on the basis of the union membership of the three employees who were instructed to join the Union.

The Union appealed the action of the Regional Director to the General Counsel of the Board. On November 8, 1979, the General Counsel denied the appeal. The General Counsel noted that McNeff, Inc. was forced to sign the Section 8(f) agreement.

On January 23, 1980, an election among McNeff, Inc.'s operating engineer employees was conducted by the Board. The results were not conclusive at that time because of official challenges to certain ballots and the filing by the Union of objections to the conduct of the election.

The trustees filed for a motion for summary judgment and McNeff, Inc. filed a cross-motion for summary judgment in the trustee action. On February 4, 1980, counsel for trustees and McNeff, Inc. were heard on their motions in open court.

On February 11, 1980, the District Court entered its Order granting the trustees' motion for summary judgment and denying defendant's motion for summary judgment. In the Summary Judgment Order the District Court found that the trustees had shown entitlement to the judgment as a matter of law.

McNeff, Inc. appealed the decision to the Court of Appeals for the Ninth Circuit. On October 8, 1981, oral argument was held before the Court in Los Angeles, California.

On November 17, 1980, the Board issued its Supplemental Decision and Certification of Results of Election, certifying that a majority of McNeff, Inc.'s employees did not vote for the Union and that the Union is not the bargaining representative of the employees.

On February 8, 1982, the Court issued its judgment and opinion.

The Decision of the Court of Appeals Below.

The "major issue" of the case before the Court was whether minority prehire agreements are enforceable in Section 301 litigation. The Court reviewed the wide split of authority on this issue which has developed since this Court's decision in *N.L.R.B. v. Local Union No. 103, Iron*

Workers (Higdon Contracting Co.), 434 U.S. 335 (1978). The Court reviewed the positions of the Eighth and Tenth Circuits, which have held minority prehire agreements to be enforceable in Section 301 litigation, and the contrary position of the Fifth Circuit which has held such agreements unenforceable until the union involved obtains majority status.

The Court then opted for what it called the middle position. The Court held that prehire agreements are enforceable despite a union's lack of majority status. However, the employer in such a circumstance can repudiate the agreement if the union has not achieved majority status. After such a repudiation the minority agreement is no longer enforceable. The Court held that McNeff, Inc., as a matter of law, had not repudiated the Agreement and that the Agreement was therefore valid until the lawsuit was filed.[2] The Court held that McNeff, Inc 's noncompliance with the agreement did not constitute repudiation.

The Court also rejected the position of McNeff, Inc. that this Court's decision in *Higdon* authorized only the voluntary acquisition of prehire agreements and that the agreement was therefore not enforceable. The Court specifically did not pass on whether the Union's conduct amounted to coercion.[3] The Court held that such a resolution was not

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[2]The Court apparently held that the filing of the suit constituted knowledge of the employer's repudiation as a matter of law and that liability was cut off at that point. In making this determination the Court, *sub silentio*, found that the union had not obtained majority status because there could be no repudiation once majority status was achieved. The Court did not otherwise address the issue of whether in fact the employees of McNeff, Inc. had designated the union as their majority representative.

[3]Petitioner does not request that this Court decide this issue. For purposes of argument, it will be assumed the Union's conduct amounted to coercion.

necessary because the issue of coercion can only be raised at the time of repudiation.

The Court only mentioned that unfair labor practice charges had been filed in the matter and that the General Counsel had declined to prosecute the case on the ground that a full collective bargaining relationship had not been established. The Court did not mention the outstanding election that had been conducted by the Board among McNeff, Inc.'s employees.

REASONS FOR GRANTING THE WRIT.

Introduction.

This Court, in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978), held that prehire agreements authorized by Section 8(f) of the Act did not ripen into collective bargaining agreements until the union obtained the majority support of the employer's employees. The issue was presented to this Court when a Court of Appeals refused to enforce a Board order which was based on the Board's position that minority prehire agreements are not enforceable. Since the *Higdon* decision, courts have differed on the applicability of the *Higdon* decision in suits brought under Section 301 of the Act to compel compliance with such minority prehire agreements.

As noted by the Court below, its decision constituted the third separate and conflicting opinion among the Courts of Appeals on this issue. A fourth approach has been adopted by certain federal district courts and has been considered, but not yet adopted, by the Courts of Appeals. These conflicts are causing confusion and uncertainty in the construction industry and need to be resolved by the review of these issues.

Furthermore, the decision of the Court below greatly fragments national labor policy and directly conflicts with this Court's prior holdings in *Higdon* and *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249 (1974).

The Court below held that the prehire agreement involved was enforceable even though the National Labor Relations Board refused to enforce the agreement under the provisions of Section 8(a)(5) of the Act. This was not the case of two tribunals with concurrent jurisdiction reaching separate results based on different interpretations of the facts. It was

the case of two forums deciding the same issue based on differing labor policies. As the Court below noted, the General Counsel of the Board declined to proceed on this case on the ground that the Union had never obtained majority support, and, thus, a full collective bargaining relationship had never been established. The Court below, however, refused to hold the minority status of the Union to be determinative. The Court instead held that the enforceability of prehire agreements hinged on the existence or lack thereof of an affirmative repudiation by the employer. Thus, there are two separate and conflicting national labor policies administered within the geographic boundaries of the Ninth Circuit.

This dual national labor policy conflicts with this Court's holding that the effectuation of national labor policy was committed by Congress primarily to the National Labor Relations Board, subject to limited judicial review. *Higdon*, 434 U.S. at 350. Furthermore, the decision of the Court below in granting relief under Section 301 of the Act, when national labor policy precludes such relief under Section 8(a)(5) of the Act, directly conflicts with this Court's clear admonition in *Howard Johnson* that "basic policies found controlling in an unfair labor practice context" may not be "disregarded by the courts in a suit under § 301 . . . ." *Howard Johnson*, 417 U.S. at 256.

Thus, there is not only a split among the Courts of Appeals, there are dual national labor policies existing within several of the circuits. As is demonstrated in this matter, these dual national labor policies have resulted in clashes between the courts and the Board over the resolution of the same claims arising from prehire agreements.

The decision of the Board not to proceed on this matter was based on the wishes of the employees. This approach adhered to the principles adopted by this Court. This Court,

in *Higdon*, condemned the use of "top-down" organizing and noted that Congress, in permitting the existence of prehire agreements, did not condone the imposition of a minority union over the wishes of the employees. This Court emphasized that any party could seek a representation election before the Board despite the existence of the prehire agreement. This Court adamantly rejected the acquisition of such prehire agreements by coercion. *Higdon*, 434 U.S. at 347-49. Despite this, the Court below did not focus its inquiry on employee wishes. Instead it based its decision on notification by the employer of repudiation of the prehire agreement. Furthermore, it held that minority unions which obtain prehire agreements by coercion may, nevertheless, impose their will on the employees until notice of repudiation. Finally, since it held that the minority status of a union was not determinative, it rendered the election procedures of the Board meaningless.

The decision below, thus, adversely affects the construction industry and federal labor policy. The wishes of construction employees are not controlling and their recourse to utilize the procedures of the Board to preserve their interests has been taken away. Employers, employees, unions and trust funds are subjected to conflicting determinations by different tribunals within the same geographic jurisdiction and are subjected to different national labor policies in the various circuits.

ARGUMENT.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *N.L.R.B. v. LOCAL UNION NO. 103, IRON WORKERS (HIGDON CONTRACTING CO.)*, 434 U.S. 335 (1978).

A. Minority Prehire Agreements Are Unenforceable.

The pivotal question before the Court of Appeals was: is a Section 8(f) prehire agreement enforceable absent a showing that the union is the majority representative of the employer's employees? That was the same question presented to this Court in *N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 (1978). The Court of Appeals and this Court are in conflict on the answer to this question, and this conflict requires prompt resolution by this Court.

In *Higdon*, this Court reviewed the Board's interpretation of Section 8(f) and its interplay with "other sections of the Act, primarily Sections 8(a)(5) and 8(b)(7)(C)". *Id.* at 341. After an extensive analysis of legislative history, this Court adopted the position of the Board.

The cornerstone of this Court's decision was based on the wishes of the employees. This Court noted that the Board's position was rooted in the statutory policy that a union should not act as the collective bargaining agent for employees unless it is the voice of the majority of the employees. *Id.* at 344. This Court then reiterated its prior holding in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), that one of the major aims of the 1959 Act was to limit "top-down" organizing. This Court emphasized that such Congressional concern "did not evaporate as the focus turned to the construction industry" and admonished that the convenience afforded the construction industry to enter into prehire agreements was not meant

to "be portrayed as an expression of the employees' organizational wishes." As this Court observed, a proviso to Section 8(f) was added to ensure that an election could be demanded despite the existence of the prehire agreement. *Higdon*, 434 U.S. at 347-49.

Despite this Court's concern for the will of the employees, the Court below has held that minority prehire agreements are enforceable until notice of repudiation.

To support its position, the Court below reviewed this Court's *Higdon* decision and noted that this Court, in one instance, labeled prehire agreements "voidable". The Court below then reasoned that the employer must actively repudiate such an agreement and further held that noncompliance with the agreement does not constitute such repudiation.

The Court below thus focused its attention on the conduct of the employer rather than the will of the employees. This approach makes employee union sentiment irrelevant and places the control of union designation in the hands of the employer. Nothing could be more inconsistent with the purposes of this Court's ruling.

Furthermore, the isolation of the term "voidable" ignores the numerous statements by this Court that the enforceability of a prehire agreement is *contingent* on the union obtaining majority support among the employer's employees. This Court repeatedly embraced the Board's position that it is encumbent on the union to establish the fact of majority

status before a tribunal can hold an agreement to be enforceable.[4]

Most telling, this Court in *Higdon* specifically reviewed and adopted Board decisional authority which specifically rejected the analysis of the Court below. In accepting the Board's interpretation of national labor policy, this Court commented extensively on the Board's landmark decision in *R.J. Smith Construction Co.*, 191 NLRB 693 (1971).

In *R.J. Smith*, the employer had totally ignored the prehire agreement since its inception. The union sought to recover past wages allegedly lost by the employees under the agreement. Such a claim would be honored by the Court below since there was no active repudiation. The Board, however, held that the majority status of a union may be examined, at any time during a prehire agreement, in the litigation of refusal to bargain charges. Indeed, the Board's dissenting members admonished that the Board's position meant that such agreements can be "ignored with impunity".

The Board decision in *Higdon* also rejected the analysis of the Court below. *Ironworkers Local 103 and Higdon Contracting Co.*, 216 NLRB 45 (1975). In *Higdon* the employer had signed and honored a prehire agreement on some jobsites, but had ignored it on other jobsites through the operation of another corporate entity which the Board held

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[4]This Court reviewed Board law which held that the duty "to honor the contract is contingent on the union attaining majority support" and that an employer does not violate Section 8(a)(5) when it "refuses to honor the contract" and the "union fails to establish in the unfair labor practice proceeding that it has ever had majority support." *Higdon*, 434 U.S. at 345. At other places in its decision this Court again noted that the Board will not issue a Section 8(a)(5) bargaining order against an employer refusing to honor a prehire agreement "unless the union can demonstrate its majority status." *Id.* at 344. This Court also noted that the Board emphasized in the *Higdon* case that the union involved had not achieved majority support and the prehire agreement therefore "had no binding force." *Id.* at 340.

to be an alter ego. The administrative law judge before the Board distinguished the *R.J. Smith* decision by noting that the employer was trying to abide by the agreement and ignore it at the same time. The judge further noted that the employer did not actively repudiate the agreement and held that it was not privileged to ignore the agreement in such a manner.

In review, the Board specifically commented on and rejected the judge's requirement of an active repudiation by the employer. The Board noted that the employer had indeed ignored the agreement on certain projects and that it was privileged to do so if the union had not obtained majority status. This Court then adopted the Board's holding.

Finally, this Court, in *Higdon*, specifically dealt with the applicability of its holding to Section 301 suits, such as the case in issue. In rejecting the union's position that its holding was inconsistent with one of its prior determinations, this Court explained that its earlier ruling concerned the jurisdiction of federal courts to entertain suits on Section 8(f) contracts. This Court then stated:

> That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent . . . for a court to hold that the union's majority standing is subject to litigation in a § 301 suit to enforce a § 8(f) contract . . . and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable. *Id.* at 351-52.

The Court below has now held that absent a showing of majority status, the contract *is* enforceable. Only the affirmative notice of repudiation can stop the imposition of a minority union on the employees. During this time the minority union can enforce its union security clause and take

other action inconsistent with the wishes of the employee majority.[5]

B. The Decision Below Renders the Election Process of the Act Meaningless.

This Court, in *Higdon*, noted that the proviso to Section 8(f) provides that prehire agreements shall not bar a petition for an election under the Act. The Court emphasized that the "employer and its employees — and the union for that matter — may call for a bargaining representative election at any time". *Higdon*, 434 U.S. at 345. This Court reasoned that this proviso evidenced the intent of Congress that prehire agreements were not meant to be imposed on employees despite their wishes. *Id.* at 349.

This Court specifically noted the Board's analysis of the election proviso set forth in the Board case of *R.J. Smith Construction Co., supra*. In *R.J. Smith*, the Board stated:

> Inasmuch as Congress clearly intended to permit a test, by petition, of majority status . . . at any time during the contract, it would be anomalous, indeed, to hold that Section 8(f) prohibits examination of those questions in the litigation of refusal-to-bargain charges. 191 NLRB at 694.

The same anomalous result flows from the enforcement of minority prehire agreements through the litigation of Section 301 breach of contract cases.

A call for an election is totally irrelevant in the Eighth and Tenth Circuits since these Courts have held that minority agreements are enforceable in any event. *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981);

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[5]Indeed, the employees in this case were sent to join the union only after their employer was coerced into signing the agreement. This coercive utilization of top-down organizing is the very evil which this Court condemned in *Higdon*.

New Mexico Dist. Council, etc. v. Mayhew Co., 664 F.2d 215 (10th Cir. 1981). An election petition filed by an employer in the Ninth Circuit would only be relevant as evidence of repudiation. But the same would not be true for a petition filed by employees since it is the employer's repudiation which is crucial to the Court below. And, in the Ninth Circuit, an election would not be relevant for any point prior to repudiation even when the affected employees were eligible to vote in the election.[6]

These results stem from the fact that these Courts of Appeals do not focus their inquiry on the will of the employees. As such, the election process, which was an integral part of the Congressional scheme in enacting Section 8(f), does not fit into the analytic scheme fashioned by these Courts of Appeals.

These results also conflict with the decisions of this Court in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964) and *South Prairie Construction Co. v. Local 627, Int'l. Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1976).

In *Carey*, arbitration was sought pursuant to an enforceable collective bargaining agreement with a particular union. The nature of the grievance involved possible conflicts with employees represented by another union and the employer refused to arbitrate, contending that the Board had exclusive jurisdiction over such disputes. This Court noted that if the controversy were essentially a representational matter, the

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[6]The Board has often included past employees as well as present employees in elections in the construction industry. The Board often uses a special voter eligibility formula in the construction industry due to the fluctuation of the work force in the industry. *Daniel Construction Co.*, 133 NLRB 264 (1961).

It is for the Board to determine employee eligibility requirements in each case. *See, South Prairie Construction Co. v. Local 627, Int'l. Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1976).

employer could protect itself by invoking the procedures of the Board. *Carey*, 375 U.S. at 268. Since the employer had not yet invoked the procedures of the Board, this Court refused to halt arbitration based upon speculation that a final result may conflict with Board law. This Court did, however, state that upon the Board's review of the arbitrator's award, if the Board disagreed with the arbitrator, then, "the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301." *Id.* at 272. The Court also noted that the "*superior* authority of the Board may be invoked at any time." (Emphasis added) *Id.* at 272.

In *South Prairie Construction Co. v. Local 627, Int'l. Union of Operating Engineers (Peter Kiewit), supra*, this Court vacated the judgment of a Court of Appeals which, upon review of a Board order, had determined, in the first instance, a representation issue. The Board had not addressed the matter because it had disposed of the case on other grounds. This Court held that the representation issue should have been determined initially by the Board. This Court noted that the Board's decisions on such matters, if not final, are, nevertheless, "rarely to be disturbed."

It is clear that the Court below did not defer to the Board in its initial determination of the representation issue. The Court below went even further, it rendered the Board's representation proceedings meaningless. McNeff, Inc. had invoked the "superior authority" of the Board by filing a petition for an election.[7] The final result of the Board's exercise of such authority is now meaningless because the

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[7]The courts below should have deferred to the superior authority of the Board at the time the Board's authority was invoked.

majority status of the union is not relevant to the Court below.

Hence, the decision of the Court below, and those of the Courts of Appeals for the Eighth and Tenth Circuits, adversely affect employee rights and the national labor policy. This Court should take this opportunity to restore the basic federal labor policy of preserving employee free choice in the selection of bargaining representatives.

C. Only Voluntary Prehire Agreements Are Authorized by Higdon.

In its *Higdon* decision this Court repeatedly emphasized that Congress intended prehire agreements to be voluntary and that "no element of coercion" was intended to be permitted in obtaining such agreements. In reviewing legislative history, this Court noted Senator Kennedy's explanation to the Senate that the legislation was not intended to authorize coercion to obtain prehire agreements where the majority status of the union has not been established. *Higdon*, 434 U.S. at 348, n. 10, citing II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1715.

Despite this, the Court below sanctioned the acquisition of minority prehire agreements by coercion by holding that such issues can only be raised at the time of repudiation. No other Court of Appeals has adopted this ruling.

Thus, minority unions can obtain recognitional rights by coercion and, until repudiation, can effectively enforce union security clauses and otherwise adversely impose their will on the majority of the employees. This coercive representation can continue forever if the employer refuses to repudiate the agreement. Since such an employer once acquiesced to such pressure, this perpetual imposition of a union's will by coercion is more than a mere possibility.

This Court recently held in *Kaiser Steel Corporation v. Julius Mullins*, 70 L.Ed.2d 833, 102 S.Ct. ...., No. 80-1345 (January 13, 1982), that an employer may raise the illegality of a contract as a defense to a breach of contract suit brought by trustees pursuant to Section 301 of the Act. This Court did not limit such a defense to a point in time in which the employer repudiated the agreement or any other artificial time.

It is clear that Congress, the Board and this Court have condemned the coercive obtainment of prehire agreements. This Court has not yet determined if the coercive acquisition of prehire agreements can be raised as a defense to a breach of contract suit under Section 301 of the Act. This issue is an important issue involving our national labor policy and should be resolved by this Court. If an affirmative defense cannot be raised on this issue, unions can ignore the will of Congress and the decisions of this Court and reap the benefits from their misconduct.

D. Conclusion.

The facts of this case reveal that the employees are the ones to lose by the decision of the Court below. The Union did not attempt to organize the employees by soliciting their support. The employees were nonunion and were working on a project for a nonunion employer. They could expect to retain their positions without changing their status. Yet the Union threatened the employer and obtained its reluctant signature on the Agreement. The employees were then instructed to join the Union.

The Court below has sanctioned this tactic of top-down organization by coercion, and, as noted earlier, has effectively prevented the employees involved from utilizing the

Board's election process if they objected to the imposition of a minority union as their representative. Nothing could be more inconsistent with this Court's *Higdon* decision.

THE DECISION BELOW FRAGMENTS NATIONAL LABOR POLICY BY ESTABLISHING CONFLICTING DUAL POLICIES ADMINISTERED BY TWO DIFFERENT TRIBUNALS.

The national labor policy enforced uniformly throughout the nation by the Board is that prehire agreements are not enforceable absent a showing of union majority status. The Board has made it clear that the proof of majority status is a condition precedent to enforceability under Section 8(a)(5) of the Act. No affirmative repudiation by the employer is required to perfect the employer's defense.

This national labor policy is being eroded by the decision of the Court below and by those of the Eighth and Tenth Circuits. These Courts have developed their own national labor policies by holding minority-union prehire agreements to be enforceable in Section 301 litigation. The Eighth and Tenth Circuits have held them to be enforceable at all times. The Court below has held them enforceable until repudiation. The difference in these opinions is one of degree only. They all conflict with the national labor policy of the Board which has been embraced by this Court.

Unions and trust funds may now shop forums to obtain the more favorable national labor policy.[8] This case not only

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[8]The substantive remedies for breach of contract under Section 301 are no greater than those remedies available through the Board under Section 8(a)(5). If an employer refuses to honor an enforceable collective bargaining agreement, the Board, under Section 8(a)(5), can order the employer to honor the agreement and make back-payments for lost fringe benefits as well as lost wages. In *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) this Court held that the Board and the courts have concurrent jurisdiction to resolve disputes when an unfair labor practice also constitutes a breach of contract.

involved shopping between two forums, it involved the utilization of both forums. One forum, the Board, rejected the claim based on its interpretation of national labor policy. The other forum then upheld the same claim based on its own national labor policy. Such a result is totally adverse to this Court's repeated insistence upon a uniform national labor policy.

In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court admonished that federal common law regarding enforcement of collective bargaining agreements under Section 301 must be fashioned "from the policy of our national labor laws." *Id.* at 456. Furthermore, this Court has held that the subject matter of Section 301 is "peculiarly one that calls for uniform law." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 at 103 (1962). In *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249 (1974), this Court specifically rejected the proposition that basic federal labor policy formulated in unfair labor practice cases can be ignored in Section 301 litigation.

In *Howard Johnson* the union sought to compel a successor employer to arbitrate pursuant to a collective bargaining agreement with a predecessor employer. This Court had earlier held in an unfair labor practice context that a successor employer was not obligated to adhere to the terms of the predecessor's collective bargaining agreement. This Court then rejected the union's claim that a contrary result should be permitted under Section 301 of the Act:

> It would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the Union presses its claims. *Howard Johnson*, 417 U.S. at 256.

This Court emphasized that the union's "effort to circumvent [this Court's prior decision] by asserting its claims in a § 301 suit to compel arbitration rather than in an unfair labor practice context cannot be permitted." *Id.* at 262.

National labor policy can now be ignored in three circuits, and, as this Court has stated, this cannot be permitted.

THE CONFLICTING DECISIONS OF THE CIRCUITS NEED TO BE RESOLVED BY THIS COURT.

The four conflicting decisions of the Courts of Appeals for the Fifth, Eighth, Ninth and Tenth Circuits are indicative of the quilt-like pattern of legal opinions which has developed in the federal courts since this Court's *Higdon* decision. The wide divergence of the circuits on this issue unfortunately establishes that this quagmire is thickening rather than dissipating as the Courts of Appeals pass on the issue. A speedy resolution of the underlying issues by this Court is necessary.

The Fifth Circuit is the only Court of Appeals which has adopted the Board's position that enforceability is contingent on a showing of majority status by the union. *Baton Rouge Bldg. & Const. v. E.C. Schafer Construction*, 657 F.2d 806 (1981). This is because the Fifth Circuit is the *only* circuit to analyze the issue as one of employee free choice. The Fifth Circuit, in rejecting the application of different policies for Section 301 litigation and unfair labor practice litigation, stated:

> But this distinction makes no difference. If the goal is the maintenance and insurance of *employee* free choice, it matters not whether the sword dangling above the employer's head is an unfair labor practice charge or a breach of contract suit. The direction of the pressure is the same — toward treatment of a nonmajority union as the employee's agent for collective bargaining. *E.C. Schafer*, 657 F.2d at 813.

The Eighth Circuit in *Contractors, etc. v. Associated Wrecking Co.*, 638 F.2d 1128 (1981) concluded that the absence of majority status did not preclude enforcement of prehire agreements. Contrary to the Fifth Circuit, the *Associated Wrecking* Court held that different principles apply in Section 301 as opposed to unfair labor practice litigation:

> To say that an employer may challenge the majority status of a union in an unfair labor practice proceeding is not to say that the employer may assert the union's lack of majority status as a defense in a breach of contract action on a type of contract specifically authorized by the Act. *Associated Wrecking*, 638 F.2d at 1133.

The Tenth Circuit, in *New Mexico Dist. Council, etc. v. Mayhew Co.*, 664 F.2d 215, at 219 (1981), specifically adopted the Eighth Circuit's view on this issue. In adopting these conflicting standards for Section 301 and unfair labor practice cases, neither Court dealt with or distinguished this Court's decision in *Howard Johnson*.

The Court below did not comment upon this particular split between the other circuits or upon the issue itself. The Court actually did not acknowledge that the Board treats prehire agreements as totally unenforceable until the union establishes majority status. The Court stated only that "[s]ome language [in the Board cases] supports this view."

Also, the Eighth and Tenth Circuits held that this Court, in its *Higdon* decision, "did not purport to decide the enforceability of all Section 8(f) agreements but only those which implicated the provisions of Section 8(b)(7)(c)." *Associated Wrecking*, 638 F.2d at 1133; *Mayhew*, 664 F.2d at 219. The Fifth Circuit obviously disagreed with this analysis since it applied the *Higdon* decision to Section 301 litigation. The Court below also did not agree with the Eighth and Tenth Circuits on this issue. The Court below

held that the *Higdon* decision was "written much more broadly than that view allows." The Court below stated that it formulated its decision based on a matter of policy and as a "matter of interpretation" of this Court's *Higdon* decision.

Although the decision of the Court below is not clear, it appears that the Court below and the Fifth Circuit find this Court's *Higdon* decision to be applicable to Section 301 litigation — they just disagree as to the proper interpretation to be applied. The Eighth and Tenth Circuits, however, find that this Court's decision is not applicable to Section 301 litigation at all and that this Court's decision should be confined to unfair labor practice litigation before the Board.

Hence, the Courts of Appeals have applied three different analyses to these issues which have resulted in three totally different results.

A fourth analysis which causes yet another result has been adopted by a federal district court and has been argued before the Courts of Appeals. In *Pension Fund v. Southern Stress Wire Corp.*, 509 F.Supp. 1097 (1981), the District Court for the Northern District of Georgia held that defenses that an employer could raise against a union could not be raised against trustees as third party beneficiaries. This analysis is based on this Court's decision in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), where this Court held that an employer could not assert a union's breach of contract as a defense in a suit on the contract by the trustees.[9]

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[9]The Eighth Circuit specifically declined to pass on this issue since it held minority prehire agreements to be enforceable in all circumstances in Section 301 litigation. *Associated Wrecking*, at 1120. The Fifth Circuit rejected the argument, *E.C. Schafer*, 657 F.2d at 813, and the Court below has not adopted it.

The Court below actually included the Courts of Appeals for the Eighth and Tenth Circuits in this category. However, the Eighth Circuit specifically declined to pass on this issue and the Tenth Circuit case of *Mayhew* did not even involve the trust fund.

This analysis creates a fourth possibility where only the fringe benefit provisions of minority prehire agreements are enforceable and only through suits by the trustees.

These conflicting analyses and results adversely affect this nation's need for a uniform national labor policy. The decisions of the Courts of Appeals which have passed on these issues provide confusion rather than guidance to those courts which have yet to reach their decisions. This growing problem can only be resolved by a speedy resolution of the issues by this Court.

CONCLUSION.

For the reasons set forth above, a Writ of Certiorari should be issued by this Court to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this matter.

Los Angeles, California.

Dated: May 5, 1982.

Respectfully submitted,

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